IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Execution Petition No. 26 of 1989 &
OMPs No. 201 of 1994 & 189 of 1999

Judgment reserved on: 12.9.2006

Date of decision : 22.9.2006

State Bank of India …Decree Holder.

Versus

M/s Esskay Woollen & Spinning Mills (P) Ltd. Industrial Estate Kangra and another

…Judgment Debtors.

Coram

The Hon'ble Mr. Justice : Surjit Singh, Judge.

Whether approved for reporting?

For the decree holder : **Mr. K.D. Sood, Advocate.**

For the judgment debtors: **Mr. Ashutosh Burathoki, Advocate, for judgment debtor No. 2.**
Mr.Kuldeep Singh, Senior Advocate with Mr. Raman Sethi, Advocate, for auction purchaser.

Surjit Singh, Judge

This Court, in exercise of its original jurisdiction, passed an exparte decree for a sum of Rs.1,07.501.42 P. with interest at the rate of 11% and costs of the suit, in favour of decree holder – State Bank of India and against judgment debtors M/s Esskay Woollen & Spinning Mills (P) Ltd. Industrial Estate Kangra and Mrs Parveen

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Whether reporters of Local Papers may be allowed to see the Judgment?

Chaudhary, hereinafter referred to as judgment debtors 1 and 2 respectively, vide judgment dated 30.4.1981 in Civil Suit No. 10 of 1980. When the decree money was not paid, the decree holder filed an execution petition. Execution of decree was sought by attachment and sale of 442 Kanals 7 Marlas land, situate at Mehal Beli, Mauza Stana, District Kangra, owned by judgment debtor No. 2. The Court passed an order for attachment of the property on 9.5.1991. Thereafter an application was moved by the decree holder praying for the sale of the attached property and settling the terms of proclamation, under Order 21 Rule 66 of the Code of Civil Procedure, which was registered as OMP No. 428 of 1991. In the meanwhile an application, under Order 9 Rule 13 of the Code of Civil Procedure, was moved by the judgment debtors for setting aside the exparte decree. In the proceedings of that application, execution of the decree was stayed. That application for setting aside the exparte decree was ultimately dismissed and the order staying the execution of the decree vacated. The Execution petition was then listed in the Court on 3.3.1994, when the following order was passed:-

> "Let the execution petition be listed before the Registrar (Vigilance) for settling the terms of proclamation."

This order was passed without any reference to the application moved by the decree holder for the sale of the attached property and settling terms of proclamation, under Order 21 Rule 66 of the Code of Civil Procedure. The matter was taken up by the Registrar (Vigilance)

on 15.3.1994 in the presence of the Advocates appearing vice counsel for the parties and the following order was passed:-

> "Issue warrant of sale against the attached property. The notice regarding sale of the property be affixed on some conspicuous place at Mauza Satana, that is, where the property is situated and as well as on the Notice Board of the Collector, District Kangra at Dharamshala. The notice regarding the sale be affixed on April 21, 1994. The sale be, thereafter, made on April 27, 1994. The warrant be called back for May 10, 1994. The requisite process fee and proclamation charges be deposited within a period of ten days from today."

2. Auction was conducted on the spot in terms of the aforesaid order and the property was sold for Rs.3.13 lacs. The auction purchaser was Shri Raj Kapoor. The matter was then listed in the Court on 17.5.1994. It was stated on behalf of judgment debtor No. 2 that she wanted to file objections to the sale of the attached property. Two sets of objections were filed – one by Pt. Om Parkash, Advocate and another by Shri R.L. Sood, Advocate. Later on objections filed by Pt Om Parkash were withdrawn with the statement that judgment debtor No. 2 had engaged Shri R.L. Sood, Advocate, and Pt. Om Parkash was engaged by someone acting as her attorney. In the objection petition, filed by judgment debtor No. 2 through Shri R.L. Sood, Advocate, following objections are raised:-

(a) There was no order for the sale of the attached property and, therefore, the sale is illegal and without jurisdiction;

(b) Registrar (Vigilance) had been required by the Court only to settle the terms of sale, but without there being any further order, particularly the order for sale of the property, he himself ordered the issuance of warrant of sale of the attached property and thus his order was illegal and void;

(c) Proclamation did not contain the necessary particulars, description and the valuation of the property and hence it was no proclamation in the eyes of law;

(d) Due publicity was not given to the proclamation;

(e) The attached property was to the extent of 442 Kanals 7 Marlas and its value was not less than Rupees twenty lacs but the whole of which was put to auction and sold for a paltry sum of Rs.3.13 lacs;

(f) Auction was conducted at the fag end of the day when most of the bidders had already left.

3. The decree holder and the auction purchaser have filed separate replies to the objection petition. Both of them have denied the allegation that the sale was conducted without there being any order for sale from the Court. It has also been denied that the proclamation lacked material particulars and description of the property or that due publicity was not given to the proclamation. Auction purchaser has stated that the property was sold at the rate of Rs.725 per Kanal whereas the average sale price of the land in the area was Rs.544 per Kanal. It was stated that in the objection petition

no fraud or irregularity was alleged to have been committed and, therefore, the objections, under Order 21 Rule 90 of the Code of Civil Procedure, were not maintainable.

4. This Court framed the following issues, vide zimini order dated 3.9.1997:-

> "1. Whether the sale is liable to be set aside, inter alia, on the grounds mentioned in the application? OP JD-2.
> 2. Relief."

5. Parties were permitted to place on record affidavits by way of evidence within three weeks. Option was also given to them to apply for examining witnesses, in case it was so desired. Various opportunities were given to the objection petitioner, i.e. judgment debtor No. 2, to lead evidence on her asking, but she neither took any steps to produce any evidence nor did she produce any witness / evidence and ultimately vide order dated 18.5.200 her evidence was closed.

6. In the meanwhile an application (OMP No. 189 of 1999) was moved by judgment debtor No. 2, in which it was stated that during the pendency of the execution petition judgment debtor No. 2 had made payment of Rs.2,84,001/- to the decree holder and this amount being more than the amount due, the decree stood satisfied and, therefore, the execution petition was liable to be dismissed.

7. The decree holder filed reply admitting certain payments and alleged that a sum of Rs.1,20,219.83 was still due. Some

calculations were also filed. It was further alleged that the petition for deposit of decretal money was not within time.

8. Judgment debtor No. 2 filed rejoinder denying that the amount paid by her to the decree holder was shorter than the money due under the decree. The Court required the Registrar (Vigilance) to work out the amount actually due. The Registrar (Vigilance) reported that certain more amount of money was due. The parties raised no objection to the report of the Registrar (Vigilance). The judgment debtor deposited the money reported to be due.

9. Following issues were framed on OMP. No. 189 of 1999:-

> "1. Whether the application has not been made within time and is not maintainable, as alleged? O.P.D.H.
> 2. Whether the decree in dispute stands satisfied, as alleged? O.P.J.D.-2.
> 3. Relief."

10. I have heard the learned counsel for the parties and gone through the record. For the reasons, recorded hereinafter, my findings on the issues, framed in the objection petition (OMP No. 201 of 1994) and the application for deposit of decretal amount (OMP No. 189 of 1999), are as follows.

Issue No. 1 (as framed in OMP No. 201 of 1994)

11. After the attachment of the property of judgment debtor No. 2, pursuant to order dated 9.5.1991, an application was moved by the decree holder for ordering the sale of the attached property and settling the terms of proclamation, under Rule 66 of Order 21 of the

Code of Civil Procedure. That application was registered as 'OMP No. 428 of 1991'. No order was passed by the Court on this application before the sale of the attached property and for that matter even before the filing of the present objection petition. As a matter of fact, this application was disposed of on 14.7.2003, when the following order was passed thereon:-

> "OMP No. 428 of 1991
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> Heard. This application is for settling the terms of the terms of the proclamation. According to the learned counsel for the auction purchaser, this application does not survive now because such terms had already been settled vide order dated 15.3.1994 of the learned Registrar (V), whereas the contention for JD No. 2 is that no such terms have been settled. A perusal of the order dated 15.3.1994 clearly indicates that the terms of the proclamation have been duly settled therein and this application has, thus, become infructuous and accordingly is disposed of."

12. Apparently, no order for the sale of the attached property was passed by the Court, under Order 21 Rule 64 of the Code of Civil Procedure. The order that was passed by the Court, after the attachment of the property, on 3.3.1994 reads as follows:-

> "Let the execution petition be listed before the Registrar (Vigilance) for settling the terms of proclamation."

13. Order 21 Rule 64 of the Code of Civil Procedure is reproduced for ready reference:-

> ”**64. Power to order property attached to be sold and proceeds to be paid to person entitled.-** Any Court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same.”

14. A bare reading of the provision shows that the Court is required to pass an order for sale after the attachment of the property and this order is not to be passed in a mechanical manner, but by due application of mind in the sense that it is required to be determined and decided whether the sale of the entire attached property is necessary for the satisfaction of the decree or the sale of a portion of it would fetch enough price to satisfy the decree.

15. The parties continued to argue the matter on a number of days, though for short spells, but no direct authority on the point as to what would be the effect of sale of attached property without there being a specific order to that effect by the Court, was cited. Learned counsel for the judgment debtor / objector submitted that he had not been able to lay hand on any direct authority on the point. He, however, cited a couple of judgments of the Hon’ble Supreme Court, wherein it has been held that if the Court orders sale of the entire attached property without addressing itself to the issue whether the sale of the entire attached property should be ordered or the sale of only a portion of it will be sufficient to satisfy the decree, the same will

be void and without jurisdiction and such a case would be covered not by Rule 90 of Order 21 of the Code of Civil Procedure, pertaining to the setting aside of sale on the ground of material irregularities resulting in substantial injury to the judgment debtor, but under Section 47 of the Code of Civil Procedure relating to execution, discharge and satisfaction of decree. The judgments cited by the learned counsel for the judgment debtor / objector are;

(i) **S. Mariyappa (dead) by LRs. and others vs. Siddappa and another,** [(2005) 10 SCC 235]. In this judgment it has been held that the executing Court is duty bound to consider whether sale of only a part of property would be sufficient to meet the decretal debt. Also, the following portion of an earlier judgment of the Court in **Takkaseela Pedda Subba Reddi vs. Pujari Padmavathamma,** [(1977) 3 SCC 337] has been quoted with approval.

> "4. Not only are we bound by this judgment but we are in full agreement with the principle laid down therein. As the executing court has not observed its statutory duty, the sale will have to be and is hereby set aside. The purchaser shall be returned his monies and the property be handed back to the appellants. We clarify that it will be open for the judgment-debtor to seek execution of his decree in accordance with law."

(ii) **Ambati Narasayya vs. M. Subba Rao and another,** (AIR 1990 SC 119). In this case, while interpreting the provision of Order 21 Rule 64 of the Code of Civil Procedure, the Hon'ble Supreme Court has observed and held as follows vide para 7:-

> "7. It is of importance to note from this provision that in all execution proceedings, the Court has to first decide whether it is necessary to bring the entire attached property to sale or such portion thereof as may seem necessary to satisfy the decree. If the property is large and the decree to be satisfied is small, the Court must bring only such portion of the property, the proceeds of which would be sufficient to satisfy the claim of the decree-holder. It is immaterial whether the property is one or several. Even if the property is one, if a separate portion could be sold without violating any provision of law only such portion of the property should be sold. This, in our pinion, is not just a discretion, but an obligation imposed on the Court. Care must be taken to put only such portion of the property to sale the consideration of which is sufficient to meet the claim in the execution petition. The sale held without examining this aspect and not in conformity with this requirement would be illegal and without jurisdiction."

16. Learned counsel for the judgment debtor / objector further submitted that even though the objection petition was labelled as one under Order 21 Rule 90 of the Code of Civil Procedure, in fact the objections, which were there in the petition, particularly the one that the sale was made without there being any order from the Court, was an objection under Section 47 of the Code of Civil Procedure and needed to be considered and decided under the provision of Section 47. He submitted that as held by the Hon'ble Supreme Court in the above cited judgments, where the objection is covered by the

provision of Section 47, no substantial injury, on account of material irregularity in sale, is required to be proved. In the alternative he submitted that substantial injury was implicit in the very objection, because a huge chunk of land, measuring 442 Kanals 7 Marlas, had been sold for just Rupees three lacs thirteen thousand. He cited a judgment of the Hon'ble Supreme Court in support of his contention that where the substantial injury is implicit in the alleged material irregularity, it need not be specifically averred and established. The citation is **Laxmi Devi vs. Mukand Kanwar and others,** (AIR 1965 SC 834).

17. It was further submitted on behalf of the judgment debtor / objector that not only in the case of non-observance of Rule 64 of Order 21 of the Code of Civil Procedure, but even in the case of non-observance of the provision of Rule 66 of Order 21, pertaining to the settling of terms of proclamation and its publicity, sale had been set aside by the Hon'ble Supreme Court in **M/s. Shalimar Cinema vs. Bhasin Film Corporation and another,** AIR 1987 SC 2081). He relied upon para 3 of the judgment, which reads as follows:-

> "3. In the view that we propose to take on the second question, we do not consider it necessary to express our view on the first question. But we do wish to say that the court has a duty to see that the requirements of O. XXI, R. 66 are properly complied with. In the words of the Judicial Committee, "In sales under the direction of the court, it is incumbent on the court to be scrupulous in the extreme". Though it may not be necessary for the court

> to make a valuation and enter it in the sale proclamation in every case, it is desirable at least in cases of sale of valuable property that the court make its valuation and enter it in the sale proclamation. We think it necessary to add that no action of the court or its officers should be such as to give rise to the criticism that it was done in an indifferent or casual way. We are constrained to make these observations because it was found by the learned single Judge in the present case that there actually was no application under O. XXI, R. 66 and that the sale proclamation was prepared in a routine fashion. ….”

18. Applying the ratio of the aforesaid precedents of the Hon’ble Supreme Court to the facts of the case in hand, it can conclusively be said that the sale of the attached property of judgment debtor No. 2, made in favour of auction purchaser Raj Kapoor, was illegal and without jurisdiction inasmuch as not only that there was no application of mind to the issue whether whole of the attached property was required to be sold or only a portion of it was sufficient to satisfy the decree, but no order, for the sale of the attached property, was passed at all.

19. To be fair to the learned counsel for the auction purchaser, I now proceed to notice the main submissions made by him and the precedents cited in support of such submissions.

20. Learned counsel submitted that the order dated 3.3.1994 was required to be interpreted as a composite order for the sale of the property and the settlement of terms of proclamation, because an

application for the purpose, i.e. OMP No. 428 1991, had been moved by the decree holder after the attachment of the property and so the order is required to be supposed to have been passed on that application.

21. The argument is without merit. The order, as reproduced hereinabove, makes no reference to the application for the sale of the property nor does it say even a word about the sale, leave alone touching the vital point required to be considered by the Court while passing the order for sale, viz. whether the whole of the attached property should be sold or a part of it would be sufficient to satisfy the decretal debt.

22. Learned counsel further submitted that omission on the part of the Court to consider whether the whole of the property needed to be sold or the sale of the portion of it could satisfy the decree, was not fatal. He submitted that even if the provision of Rule 64 of Order 21 of the Code of Civil Procedure be assumed to be mandatory in nature, the same is for the benefit of the judgment debtor and the judgment debtor had waived this benefit, because even though at the time of passing of the order for the settlement of the terms of proclamation by the Registrar (Vigilance) her counsel was present, no objection was raised that there was no order for the sale of the property. In support of this argument, learned counsel placed reliance upon **Dhirendra Nath Gorai vs. Sudhir Chandra Ghosh and others,** (AIR 1964 SC 1300).

23. In the aforesaid case before the Hon'ble Supreme Court, the facts were that sale of attached property had been ordered without complying with the provision of Section 35 of the Bengal Money Lenders Act, 1940, which provided that proclamation of the intended sale of property in execution of a decree, passed in respect of a loan, shall specify only so much of the property of the judgment debtor as the Court considered to be saleable at a price sufficient to satisfy the decree and the property so specified shall not be sold at a price, which is less than the price specified in such proclamation. In that case before the drawl of proclamation, under Order 21 Rule 66 of the Code of Civil Procedure, notice was sent to the judgment debtor, but he did not turn up despite service of notice, hence the proclamation was drawn up in his absence. Later on, the judgment debtor challenged the sale alleging non-observance of mandatory provision of Section 35 of the aforesaid Act. The Hon'ble Supreme Court held that a mandatory provision can be waived if it is not conceived in the public interest, but in the interests of the party that waives it. It was further held that the provision of Section 35 of the Act, being in the interest of the person affected by its non-observance and such person having waived the benefit conferred by the provision upon him, the sale was not vitiated.

24. Learned counsel for the auction purchaser urged that the provision of Section 35 of the Bengal Money Lenders Act, 1940 is similar to the provision of Rule 64 of Order 21 of the Code of Civil

Procedure, inasmuch as both the provisions cast duty on the Court to consider whether the whole of the attached property should be sold or the sale of a part of it would fetch sufficient price for the satisfaction of the decree. He submitted that in this case the judgment debtor was represented throughout the proceedings by a counsel and that her counsel did not raise any objection at the time of the passing of the order dated 3.3.1994 by the Court for the settling of the terms and issuance of warrant of sale by the Registrar (Vigilance) and thus the judgment debtor had waived the benefit under Rule 64 of Order 21 of the Code of Civil Procedure.

25. Provisions of Section 35 of the Bengal Money Lenders Act, 1940 and Rule 64 of Order 21 of the Code of Civil Procedure are not similar. Section 35 pertains to the specification in the proclamation of sale of so much of the attached property of the judgment debtor as the Court considers to be salable at a price sufficient to satisfy the decree and the estimated value of such portion of the property. The provision pertains to a ministerial job. The provision pre-supposes the passing of an order by the Court under Rule 64 of Order 21 of the Code of Civil Procedure. As against Section 35 of the Bengal Money Lenders Act, under Order 21 Rule 64 of the Code of Civil Procedure the Court is required to consider whether the sale of the entire attached property would be required for the satisfaction of the decree or the sale of only a portion of it would fetch enough money for the satisfaction of the decree and to pass an

order accordingly. In other words, the provision mandates the Court to consider this aspect of the matter. If the Court does not follow this mandate, it will be a case of non-exercise of the jurisdiction vested in it. This act of omission on the part of the Court cannot be set at naught by the party affected by it, by waiver or even by consent, because an act, which is void on account of being without jurisdiction, cannot be validated by the consent or waiver of the parties.

26. As regards other objections, no evidence has been adduced by the objector.

27. As a result of the above discussion, it is held that the sale in favour of the auction purchaser is illegal and without jurisdiction, as the same has been effected without complying with the mandatory provision of Order 21 Rule 64 of the Code of Civil Procedure. The issue has been answered accordingly.

Relief

28. In view of the finding on issue No. 1, sale of the attached property of the judgment debtor, effected on 28.4.1994, is set aside. OMP No. 201 of 1994 is disposed of accordingly.

29. The auction money remitted to the Registry and which is supposed to have been kept in fixed deposit by the Registry in some scheduled bank, is ordered to be refunded to the auction purchaser together with interest accrued up to date on it.

OMP No. 189 of 1999

30. On account of the sale having been set aside, the application is rendered non-maintainable. The same is, therefore, dismissed.

Execution Petition No. 26 of 1989

31. As noticed hereinabove, judgment debtor No. 2 has paid the entire decretal amount to the decree holder during the pendency of the execution proceedings. So, the execution petition is dismissed as fully satisfied.

September 22, 2006(BC) **(Surjit Singh)**
Judge